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No. 491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DIFCO LABORATORIES, INC., Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No. .....

DIFCO LABORATORIES, INC., Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on May 19, 1970.

OPINIONS BELOW

The decision of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported. The Decisions and Order of the National Labor Relations Board (Appendix B, *infra*) is reported at 172 N.L.R.B. No. 235. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Section (10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Does an employer have the right to require employees who are not involved, directly or indirectly, in the strike to cross a picket line at the premises where they work where there is no showing that they were acting in concert for their own mutual aid and protection or in the interests of the employees on strike?

STATUTES INVOLVED

The relevant statutory provisions are Sections 7, 8(a)(1), and 8(a)(3) of the National Labor Relations Act, as amended, as set forth in Appendix C, *infra*.

STATEMENT

Respondent company, a Michigan corporation, engages in the manufacture, sale and distribution of biological and bacteriological media, materials and supplies at Detroit, Michigan, operates laboratories for testing and research purposes in addition to its manufacturing function (Appendix B, *infra*, p. 17). Local 246, International Union United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("UAW"), represents the Company's production and maintenance employees. Local 7-389, Oil, Chemical and Atomic Workers, AFL-CIO (the

"Union") represents the laboratory employees. The Union was certified following a Board election in September, 1964 (Appendix B, p. 18).

As a result of disagreements arising out of collective bargaining negotiations with the Company, UAW decided to strike on October 12, 1967. UAW informed the Union about a month in advance of its intention to strike, and the Union called a meeting of its members on September 27 to inform them of the impending UAW strike. Union Secretary-Treasurer, J. Roy Johnston, advised those present that they did not have to cross the picket line; that it was the Union's policy not to cross a legal picket line*. He further stated that employers with which the Union dealt recognized that policy. The UAW struck as planned on the morning of Thursday, October 12 and, by that afternoon, it had placed pickets around the Company plant, including the entrance customarily used by the laboratory employees (Appendix B, p. 19).

Following a conference with police officials, the Company and the UAW agreed that there would be no bargaining unit work done in the factory or shipping of product during the strike and the UAW would not interfere with anyone leaving or entering the plant (Record, p. 75). Thus, there is no evidence that the laboratory employees were seeking, by support of the UAW, to help UAW employees achieve their objectives. Similarly, there is no evidence that they were seeking to benefit themselves in any way.

It is not contended that the laboratory employees abstained from crossing the picket line because they were

*The legality of the UAW strike is not questioned by the Company.

afraid of violence. There is no finding that the Company discharged the employees in question because of anti-union animus. See *N.L.R.B. v. Cone Brothers Contracting Company*, 317 F.2d at p. 8 (5th Cir. 1963). Thus, their failure to cross the picket line rests solely on acceptance (for a three day period) of the advice of Union Secretary-Treasurer, J. Roy Johnston, that laboratory employees would not have to cross the picket line and that it was the Union's policy not to cross a picket line.

Two of the employees who honored the picket line were discharged by the Company. Neither was a member of the UAW. Both were included in the laboratory employees unit represented by the Union and one was steward for that Union in the laboratory. One, Murray, was suspended on October 12, and his employment was terminated on Monday, October 16 (Appendix B, *infra*, p. 21). The other, Fosgate, was discharged on October 19.

The Respondent employer took the position that discharges were justified, one by the abrupt departure on October 12, 1967 of the employee from the premises during working hours without permission and without notifying the employer, and the other by the absentee and tardiness record of the employee. The Court below held that there was substantial evidence from which the Board could have found, as it did, that both discharges were related to the failure or refusal of these two employees to cross the UAW picket line. This ruling of the lower court is not challenged here, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

The sole issue is whether or not the employer had the right to discharge these employees for their failure or refusal to cross the line under the circumstances presented here.

REASONS FOR GRANTING THE WRIT

It Is Petitioner's Contention That It Had The Right To Discharge The Employees Involved Since They Acted Individually And Not In Concert And Since Their Actions Were Not Motivated By Desire To Extend Mutual Aid Or Protection To Either Themselves Or Their Fellow Employees.

We submit that this case is controlled by the principles set forth in *N.L.R.B. v. Rockway News Supply Co.*, 197 F.2d 111 (2nd Cir. 1952), *affirmed on limited grounds*, 345 U.S. 71 (1953); *N.L.R.B. vs. L. G. Everist, Inc.*, 334 F.2d 312, (8th Cir. 1964); and *N.L.R.B. vs. Illinois Bell Telephone Company*, 189 F.2d 124 (7th Cir. 1951), *cert. den.* 342 U.S. 885 (1951).

The Court below relied chiefly upon this Court's language in *Houston Insulation Contractors Association v. N.L.R.B.*, 386 U.S. 664 (1967). It also emphasized its own decision in *N.L.R.B. v. City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965), and the language of Judge Learned Hand in *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (2nd Cir. 1941).*

We submit these cases are not in point. In *Houston*, the point of interest was whether or not the activity described was secondary or primary. This point is not an issue in this case. Petitioner admits that no secondary activity was involved here.

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*The Court below also cited *N.L.R.B. v. Greensboro Coca Cola Bottling Co.*, 180 F.2d 840 (4th Cir. 1950); *N.L.R.B. v. Guernsey-Muskingum Electric Co-Ops, Inc.*, 285 F.2d 8 (6th Cir. 1960); *N.L.R.B. v. Phoenix Mutual Life Ins. Co.*, 167 F.2d 983 (7th Cir. 1948), *cert. den.*, 335 U.S. 845 (1948); *N.L.R.B. v. Schwartz*, 146 F.2d 773 (5th Cir. 1945); *N.L.R.B. v. Southern Greyhound Lines*, —F.2d— (5th Cir., No. 27,429, decided April 20, 1970); *Salt River Valley Water Users' Association v. N.L.R.B.*, 206 F.2d 325 (9th Cir. 1953).

In *City Yellow Cab Co.*, as the quotation in the opinion of the Court below shows, there was testimony that the cab drivers who went on strike engaged in picketing because they were in sympathy with the demand of the switchboard operators for recognition. There is no testimony of this kind in the present case; the UAW agreed that employees not in the striking unit were free to cross the picket line. There is no testimony either that the UAW sought the aid of the laboratory employees or that the laboratory employees were seeking to extend aid to the UAW.

The language of Judge Learned Hand in *Peter Cailler Kohler Swiss Chocolates Co.* may be broad enough to support the decision of the Court below in this case. However, this sweeping statement is not universally supported. This Court carved out an exception upon its review of *Rockaway News Supply Co.* when it found the employee's conduct unprotected because it violated the no strike clause in a contract. As was pointed out in *L. G. Everist*, p. 317, there is no difference "between the refusal to cross a picket line in violation of a bargaining contract and the refusal to cross a picket line in violation of the ordinary and implied obligations of employment."

The correct principle to apply here is that stated by the Second Circuit Court of Appeals in the *Rockaway* case, 197 F.2d 111. In Rockaway, the Circuit Court Appeals said correctly (pp. 113-114):

> "In the cases to which we have referred the distinction between union activities by an employee during working time in violation of the employer's rules and such activities on the employee's own was applied to the soliciting of union membership in the plant. The

right to assist a union of which one is not a member by refusing to cross its picket line is certainly of no higher dignity or importance to the individual than the right to ask his fellow workers in his own plant to join with him in the union of which he is a member in concerted activities which will directly protect or aid in promoting their common interests. We think that the former is subject to the same limitations as the latter. In other words an employee is of course free to exercise his right to refuse to cross a picket line when he is on his own time and his discharge for so doing would doubtless be a violation of Section 8(a)(1). But he is not free to exercise the right during his working time in violation of his employer's working rules by refusing to perform that part of his regular duties which requires him to cross the picket line. To hold otherwise would be to permit an employee unilaterally to dictate the terms of his employment which it is well settled he may not do."

Basically the same line of reasoning appears in *N.L.R.B. v. Illinois Bell Telephone Company*. In this case, the Court held that the employees who refused to cross the picket line were as a matter of principle acting as individuals and not in combination or concert.

Similarly, in the instant case, the only basis for the employees' refusal to cross the picket line was Union policy as asserted by Mr. Johnston. Union solidarity is a vague concept at best; in reality nonexistent as is demonstrated by the internecine warfare constantly waged by the labor union in this country. There being no testimony, nor any finding of fact that the two employees in question engaged in concerted activity for mutual aid and protection within

the meaning of Section 7 of the Act, the principle of the *Peter Cailler Kohler Swiss Chocolates Co.* case does not apply, even if in other situations it may be a correct statement of the law.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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DATED: July 29, 1970

APPENDIX A

No. 19899

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

DIFCO LABORATORIES, INC., Respondent

Application for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed May 19, 1970

Before: WEICK, EDWARDS and COMBS, Circuit Judges.

PER CURIAM. The National Labor Relations Board here petitions for enforcement of its order, finding that the company had violated §8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) (1964), by threatening "disciplinary" measures against strikers and by firing two of the persons who honored a picket line conducted by the United Automobile Workers. Neither of the persons discharged was a member of the UAW, but both were members of the Oil, Chemical & Atomic Workers Union and one was steward for that union in the laboratory of the struck plant where both worked.

Respondent claims that there is no showing of antiunion bias on the part of the company, either in the language used or in the two discharges, and argues that the two discharges were justified by the prior absences of one of the employees and by the abrupt departure from work of the other.

There was, however, substantial evidence from which the Board could have found that both discharges were directly related to these two employees' refusal to cross the United Automobile Workers picket line and that since respondent was "primary employer" of all of the employees involved, the discharges resulted from concerted activity protected by the N.L.R.A.

In *Houston Insulation Contractors Ass'n v. N.L.R.B.*, 386 U.S. 664 (1967), the Supreme Court said:

> "*National Woodwork Mfrs., supra* [386 U.S. 612 (1967)] holds that collective activity by employees of the primary employer, the object of which is to effect the labor policies of that primary employer, and not engaged in for its effect elsewhere, is protected primary activity. 'Congress was not concerned to protect primary employers against pressures by disinterested unions, but rather to protect disinterested employers against direct pressures by any union.' The finding of the Board, supported by substantial evidence, was that Local 113's object was to influence Armstrong in a dispute with Armstrong employees, and not for its effect elsewhere." *Houston Insulation Contractors Ass'n v. N.L.R.B., supra* at 668. (Footnote omitted.)

Nonetheless, respondent contends that under the circumstances of this case, it had a right as an employer to require these two employees, who were not members of the union which struck and picketed at respondent's plant, to cross the picket line on pain of discharge for failure to do so. This court has previously dealt with essentially the same contention in *N.L.R.B. v. City Yellow Cab Co.*, 344 F.2d 575 (6th Cir. 1965), wherein we said:

"The cab drivers testified that they went on strike and engaged in picketing because they were in sympathy with the demand of the switchboard operators for recognition. The Act protects the rights of employees 'to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.' 29 U.S.C. §157. *N.L.R.B. v. Halsey W. Taylor Company*, 342 F.2d 406 (C.A. 6, March 3, 1965).

"As said by Judge Learned Hand in *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (C.A. 2):

"'Certainly nothing elsewhere in the act limits the scope of the language to "activities" designed to benefit other "employees"; and its rationale forbids such a limitation. When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.'

See also *N.L.R.B. v. Greensboro Coca Cola Bottling Co.*, 180 F.2d 840 (C.A. 4); *N.L.R.B. vs. Schwartz*, 146 F.2d 773 (C.A. 5).

"In *N.L.R.B. v. Guernsey-Muskingum Electric Co-op, Inc.*, 285 F.2d 8, 12 (C.A. 6), this court quoted

with approval the following language from *N.L.R.B. v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983, 6 A.L.R. 2d 408 (C.A. 7), *cert. denied*, 335 U.S. 845, 69 S.Ct. 68, 93 L.Ed. 395:

> "'A proper construction is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated . . . [and] a legitimate interest in acting concertedly in making known their views to management without being discharged for that interest.'
>
> See also *Salt River Valley Water Users' Association v. N.L.R.B.*, 206 F.2d 325 (C.A. 9); Annotation, 19 A.L.R. 2d 566." *N.L.R.B. v. City Yellow Cab Co., supra* at 582.

In our view the two cases cited above control decision in the instant case and support the findings and order of the Board. See also *N.L.R.B. v. Southern Greyhound Lines*, ——F.2d —— (5th Cir. 1970). (No. 27,429, Decided 4/20/70).

Finally, whether the UAW did or did not want the two discharged employees to strike obviously has no bearing on their right to do so if they considered such action to be in their own best interest.

Enforcement of the Board's order is granted.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Cases 7-CA-6348 and 7-CA-6348 (2)

DIFCO LABORATORIES, INC.

and

LOCAL 7 — 389, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On July 12, 1968, Trial Examiner William W. Kapell issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in these cases, and hereby adopts the findings, conclusions,

and recommendations of the Trial Examiner, as herein modified.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondent, Difco Laboratories, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Insert the following as paragraph 1(b) of the Trial Examiner's Recommended Order and reletter present paragraph 1(b) as 1(c):

"Threatening to discipline employees for engaging in protected concerted activities."

2. Insert the following paragrph after the first indented paragraph of the Notice attached to the Trial Examiner's Decision:

WE WILL NOT threaten to discipline employees for engaging in protected concerted activities.

Dated at Washington, D.C., Sept. 19, 1968

Frank W. McCulloch,	Chairman
John H. Fanning,	Member
Sam Zagoria,	Member

(Seal) NATIONAL LABOR RELATIONS BOARD

[1] Although the complaint alleged the discharges referred to therein to be violative of Section 8(a)(3) and (1) of the Act, the Trial Examiner found them violative of Section 8(a)(1) only, and made no disposition of the Section 8(a)(3) allegation. This allegation need not be considered, as the remedy for the unlawful discharges would be the same whether found violative of Section 8(a)(3) or (1) of the Act.

The Trial Examiner found that the Respondent threatened employees in violation of Section 8(a)(1) of the Act, but failed to make provision for remedying such violation in his Recommended Order or Notice. We shall amend the Order and Notice in this regard.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases 7-CA-6348 and 7-CA-6348 (2)

DIFCO LABORATORIES, INC.

and

LOCAL 7 — 389, OIL, CHEMICAL AND ATOMIC WORKERS' INTERNATIONAL UNION, AFL-CIO

Stanley H. Slaziuski, Esq., of Detroit, Mich., for the General Counsel.

Leonard A. Keller, Esq., (*Keller, Thoms, McManus and Keller*) of Detroit, Mich., for Respondent.

Mr. J. Roy Johnston for the Charging Union.

TRIAL EXAMINER'S DECISION

Statement of the Case

WILLIAM W. KAPELL, Trial Examiner: This matter, a proceeding under Section 10(b) of the National Labor Relations Act, as amended, herein called the Act, was heard at Detroit, Michigan, on April 29, 1968, with all parties participating pursuant to due notice on a complaint issued by the General Counsel on March 18, 1968.[1] The complaint, in substance, alleges that Difco Laboratories, Inc., hereinafter referred to as the Respondent, engaged in unfair

[1] Based upon original charges filed on October 19 and 25, 1967, respectively, by Local 7-389, Oil, Chemical and Atomic Workers International Union, AFL-CIO, hereafter referred to as the Oil Workers. (All dates hereafter refer to the year 1967 unless otherwise noted.)

labor practices proscribed by Section 8(a)(1) and (3) of the Act by specified acts of interference, restraint, and coercion of its employees, the suspension and discharge of employee David C. Murray, and the discharge of employee Vivian Fosgate. Respondent denies the commission of any unfair labor practice.

All parties were represented and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. Briefs were received from the General Counsel and Respondent and have been carefully considered. Upon the entire record in the cases, and from my observation of the witnesses, I make the following:

Findings of Fact

I. Commerce

At all times material herein, Respondent, a corporation duly organized under the laws of the State of Michigan, has maintained its principal office and place of business in Detroit, Michigan, and has been engaged in the manufacture, sale, and distribution of biological and bacteriological media, materials, and supplies. During the calendar year 1967, which period is representative of its operations during all the times material herein, Respondent, in the course and conduct of its business operations, purchased and caused to be transported and delivered at its Detroit, Michigan, place of business, material and supplies valued in excess of $50,000, which were transported and delivered to its place of business directly from points located outside the State of Michigan; and during the same period manufactured, sold, and distributed at its place of business, products valued in excess of $50,000 which was shipped from said place of business directly to points located out-

side the State of Michigan. Respondent admits, and I find, that, at all times material herin, has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Respondent admits, and I find, that at all times material herein Oil Workers and Local 246, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America AFL-CIO (herein referred to as UAW), have been labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Backgbround

In its business, Respondent operates laboratories for testing and research purposes in addition to its manufacturing function. At all times material herein, the production and maintenance employees have been represented by UAW. Following a Board-conducted election on September 18, 1964, in which the laboratory workers selected the Oil Workers as their bargaining representative, it was certified by the Board. However, Resondent thereafter refused to recognize the Oil Workers. Following the filing of charges based upon such refusal and after a hearing before the Board, Respondent was found in violation of Section 8(a) (5) and (1) of the Act, and ordered to recognize and bargain with the Oil Workers.[2]

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[2] *Difco Laboratories, Inc.*, 154 N.L.R.B. 921, enfd. 389 F.2d 663 (C.A. 6), cert. now pending.

As a result of bargaining disagreements with Respondent, UAW decided to strike on October 12. J. Roy Johnston, secretary-treasurer of Oil Workers, upon being notified by UAW of its decision to strike, called a union meeting of Respondent's Oil Workers on September 27, informed them of the impending strike by UAW, which, after checking with the AFL-CIO, he found to be a legal one, and advised them it was the Union's policy not to cross a legal picket line and they had never done so before.[3] On October 12, about 10 a.m., UAW struck and placed pickets at all entrances to Respondent's plant, including the entrance usually used by the laboratory employees to enter the building.

B. The Suspension and Discharge of David C. Murray

Murray began working for Respondent in the summer of 1962, and during the last 3 years he worked in the laboratory. His duties included processing culture media, enrichments, running errands, distributing distilled water, getting stock from the girls, and helping them carry materials and equipment. He was a member, and had been elected steward, of the Oil Workers for some time prior to the strike by UAW. Although he had advised Respondent of his position as steward he had been told by Aaron Lane[4] that the Company neither recognized the Union nor his alleged position as its steward.[5]

During the morning of October 12, Murray was assigned to reprocess three 12-gallon bottles of thymol turbidity and had completed the reprocessing of two of the 12-gallon

[3] Respondent does not question the legality of the UAW strike.
[4] Associate director of laboratories, and an admitted supervisor.
[5] Presumably because it continued to contest the representation of its employees by Oil Workers.

bottles but had not finished the work on the third bottle, when he was called to attend a meeting of the laboratory employees at which Lane told them that UAW was on strike, that this would be no excuse for not coming to work, and that they were under police protection and those failing to report for work would be "disciplined." Notices to that effect were also posted on the bulletin boards. Immediately after the meeting, Lane told Murray that he wished he would not get involved. Murray then left for lunch. During his lunch period, Murray was informed by other employees that Johnston had left instructions for them not to cross the picket line. After trying unsuccessfully to reach Johnston by telephone, he returned to the plant about 12:30 p.m. from where he reached Johnston on the telephone and was told to honor the picket line and go home. He thereupon left the plant without advising management.

About 7 o'clock that evening he received a telegram from Respondent stating that he had been suspended for leaving assigned work without permission or notice. The following morning he went to the plant where during the day in his capacity as union steward he advised laboratory employees that they were under union protection and did not have to cross the picket line. While he was so engaged at the beginning of each shift, three company officials[6] also attempted to persuade employees to cross the picket line and work. While Murray was attempting to persuade employee Mary Holweg to honor the picket line, Lane told her that if the group didn't come in, they knew what would happen. Both he and the company officials were partly successful in their endeavors.[7] At one time during that evening Clemz also

[6] Messers. Lane, Hurnevich, and Clemz.

[7] In its brief, Respondent acknowledges that a substantial number of laboratory employees were absent from work on Friday, October 13, and also on Monday and Tuesday of the following week but that by Wednesday, the 18th, all were back at work and continued to work throughout the strike which ended on November 6.

asked Murray to come in to work but he refused. Murray appeared at the picket line again on October 16 (Monday). That night he received a telegram from Respondent stating that after an investigation his employment had been terminated.

C. The Discharge of Vivian Fosgate

Fosgate began working for Respondent in September, 1966, as a lab technician on the afternoon shift from 4:30 p.m. to 1 a.m. On October 12, she went to work as usual. The following day (Friday) she arrived at the plant just before 4:30 p.m. where she encountered a group of employees and management officials who were talking about whether or not the employees should go to work. Murray, who was present at the time, told her she did not have to cross the picket line and she went home. The following Monday and Tuesday, Lane's secretary called her and told her Lane wanted to know when she was coming to work. Upon her reply that she would not cross the picket line, she was advised they would see her after the strike.

On October 18, Lane called her between 5:30 and 6 p.m. and asked if she was going to report for work. After inquiring whether the other employees were reporting for work and being assured that everyone else was coming in, she replied that she would try to get hold of her regular babysitter and, if successful, would report for work.[8] She also inquired whether she could contact him later on about her success in obtaining a babysitter but was told not to because he was getting ready to go home. She then tried without success to get a babysitter at various places and as

[8] Lane was aware of the fact that she had a young child who required the services of a babysitter while she was at work.

a result was unable to report for work that evening. The following morning she called Lane and explained that she had been unable to report for work the previous evening because of her inability to obtain a babysitter. After Lane replied that he was unaware of the fact that she had not reported in the previous evening, he told her that she was undependable and to call the whole thing off. She remonstrated that if she had been called earlier the previous evening she would have been in a better position to obtain a babysitter and to have been able to report for work, and offered to report for work that evening. Lane declined her offer and in effect told her that she was terminated.

The record shows further that Fosgate was absent from work on October 28 and 29 because of illness and in talking on the telephone to Lane on September 29, she was advised that she no longer would be a group leader because she was not setting a good example to the other girls in view of her absenteeism.[2]

Conclusions

It is well settled that Section 7 of the Act guarantees to employees the right, *inter alia*, to engage in concerted activities for their mutual aid and protection, and that employees who engage in such activities are protected against discharge or other disciplinary action. *Southern Greyhound Lines*, 169 N.L.R.B. No. 148, and cases cited therein. Concerted activities for mutual aid and protection have been held to include sympathy strikes by employees

[2]It also appears that about a month prior to September 29, Lane had asked why she had been late so frequently, and following her explanation he asked her to try not to be late any more and complimented her on her work. Her record for punctuality and attendance was far from impressive.

in support of fellow employees of the same company, engaged in a labor dispute with their employer. Thus, in *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503 (C.A. 2), the court stated at 505-506:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

Recently, the Supreme Court had occasion to quote the aforesaid statement with approval in *N.L.R.B. v. Houston Insulation Contractors Association*, 386 U.S. 664, 666.

The General Counsel contends that Murray, Fosgate, and other laboratory workers had the right to engage in and did engage in protected concerted activities when they refused to cross and work behind picket lines at their place of employment in support of a lawful strike involving other company employees in a different bargaining unit. He, therefore, asserts that Respondent's threats to discipline the laboratory workers if they used the strike as an excuse to refuse to cross the picket line and work and its suspension and or discharge of Murray and Fosgate violated those rights in violation of Section 8(a)(1) of the Act.

Respondent contends that the laboratory workers were not engaged in concerted activities, and that Murray and

Fosgate acted separately in refusing to cross the picket line and that, accordingly, they were not engaged in protected activities. I find no merit in this connection. The Oil Workers, at its meeting prior to the UAW strike, were directed to prepare for and engage in group action in honoring UAW's picket line. Thereafter, Murray and Johnston, at the picket line, attempted to induce group action by the laboratory workers to refuse to cross the picket line and were substantially successful at least during the first few days of the UAW strike. In fact, Respondent's brief states that a substantial number of laboratory employees were absent from work on October 13, 16, and 17. The evidence clearly establishes that the laboratory workers engaged in group activity constituting a concerted activity for mutual aid and protection.

Respondent correctly states that it could have lawfully replaced Murray and Fosgate for refusing to cross the picket line. It then syllogizes that the use of the word "disciplined" in Lane's speech to the employees and in its posting on the bulletin boards was tantamount to a threat of "replacement", and that inasmuch as the distinction between the word "discharge" (which it claims is the extreme act of discipline) and "replacement" has been abandoned by the Board and the courts,[10] the word "disciplined" can be equated with "discharge," and all that it did was to threaten discharge or replacement which it could lawfully have effected. The word "disciplined" in its ordinary meaning conveys the imposition of a sanction up to and including discharge, but is by no means confined to its maximum potential of discharge. Thus, it could have included suspension (which actually first happened to Mur-

[10]Citing *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545, 1547.

ray), or the loss of certain privileges or benefits. The imposition of any of these lesser sanctions would violate Section 8(a)(1) of the Act. If Respondent intended to threaten only a discharge or replacement, it was incumbent upon it to clarify such intention. This it failed to do. Accordingly, I find no merit in its semantic argument.

Respondent also contends that the Oil Workers' policy of honoring the picket line herein as a protected activity is dubious in view of UAW's position that it was not opposed to the laboratory employees crossing its picket line. It therefore concludes that, under these circumstances, honoring UAW's picket line was not a protected activity. I find this argument unpersuasive. Even if UAW took the position as alleged by Respondent that it would not interfere with the laboratory employees going to work, it would not follow that the UAW approved of or sanctioned dishonoring its picket line. At most, it would only be an assurrance that it would not resort to force to obtain the support of other employees.[11] Moreover, AUW's agreement not to interfere with other employees would not remove the statutory protection afforded such employees.

In conclusion I find that Respondent's threat to discipline employees who failed to come to work because of the UAW strike was calculated to convey the impression that disciplinary action of an undetermined degree would be imposed for honoring the picket line, and thereby coerced and restrained the laboratory employees in their protected concerted activities in violation of Section 8(a)(1) of the Act.

[11]Apparently the police were alerted as a precautionary measure to avoid any possible violence and the cooperation of all parties were sought to insure peaceful picketing.

D. The Suspension and Discharge of Murray

Respondent claims that Murray was first suspended and then discharged because he left the plant and his unfinished work without notifying the Company or giving a reason for his departure. As indicated above, Murray was a union steward and in that capacity he attempted to prevail upon fellow workers to honor the picket line. In fact, while engaged in that endeavor on October 13, he competed with the company officials who were attempting at the same time to induce the laboratory workers to return to work. It also appears that on the same evening he was invited to return to work by Clemz and refused. It is reasonable to conclude that if he had accepted Clemz' invitation his suspension would have been automatically lifted and his alleged unannounced departure from the pant condoned. His activity at the picket ine and his refusal of the invitation to return to work undoubtedly provoked the company officials and strongly suggests that his subsequent discharge was related to his adamant persistence in supporting UAW's picketing activities. I therefore conclude that his continued suspension and subsequent discharge were tied in with his perseverance in honoring the picket line and attempting to prevail on other employees to do so, and was not for the purpose of preserving efficient operation of Respndent's business and in order to replace him.[12]

Furthermore, Respondent has not established any legitimate and substantial business justification for not offering full reinstatement to Murray. The failure to make such an offer constituted an unfair labor practice even without regard to Respondent's intent or union animus. Thus, in

[12]No evidence was presented nor was any claim made by Respondent that Murray was replaced.

N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, the Court pointed out that by virtue of Section 2(3) of the Act, an individual whose work ceases due to a labor dispute remains an employee if he has not obtained other regular or substantially equivalent employment, and that an employer refusing to reinstate strikers must show that the action was due to legitimate and substantial justification (citing *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26). The Court further held that the burden of proving such justification was on the employer, and also noted that an act so destructive of employee rights, without legitimate business justification, is an unfair labor practice without reference to intent or improper motivation.

Respondent also relies heavily upon the Board's decision in *Redwing Carriers, Inc.*[13] and *N.L.R.B. v. Rockaway News Supply Co.*[14] in support of its right to discharge Murray. Each of these decisions involve the discharge of drivers who, in the course of making deliveries, refused to cross the picket lines at premises of employers other than their own. Also, the employees in these cases had not refused to perform all their duties for their employers but only refused to perform that part of their duties which would require them to cross the picket lines. Thus, in the *Rockaway* case, the court held it is well settled that an employee is not permitted ". . . unilaterally to dictate the terms of his employment; . . ." In the instant case, Respondent's own premises were being picketed and the employees honoring the picket line refused to engage in any part of their duties. I find the facts in the cited cases too dissimilar to support Respondent's position.

[13]137 N.L.R.B. 1545, enfd. 325 F.2d 1011 (C.A.D.C.), cert. denied 377 U.S. 905.

[14]197 F.2d 111 (C.A. 2).

E. The Discharge of Fosgate

Respondent claims that Fosgate's discharge was based solely on a poor and undependable attendance record. Respondent, however, was well aware of that record months prior to her discharge but never warned her about possible firing because of it. In fact, when Lane's secretary called her to ascertain when she would return to work, she was advised that they would see her at that time. A few days later Lane also called and asked her to return to work, and she agreed to do so after obtaining assurance that all the laboratory workers had already returned to work. At the time he also was aware of her babysitting problem and she impressed upon him the difficulty she undoubtedly would experience in attempting to obtain a babysitter on such short notice. Lane, however, imposed no ultimatum upon her availability for work that evening. He even declined her request to call back and report on her success in obtaining a sitter. Yet, when she called the following morning to explain her predicament of the preceding evening, and to assure him that she was ready to report for work on her regular shift, he fired her. Although Respondent may have been lawfully protected in discharging her because of her poor attendance record (absent other considerations), I regard her precipitous discharge without warning and in the context of her reasonable explanation for her unavailability on the preceding evening as providing a sound basis for inferring that she would not have been discharged unless Respondent was motivated at least in part because of the difficulties raised by her scrupulous regard for the picket line.

Thus, even assuming that Respondent had a valid ground for her discharge, it would be no defense to an unfair

labor practice charge if such ground was a pretext and not the moving cause or her discharge. See *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (C.A. 2); *N.L.R.B. v. Associated Naval Architects, Inc.*, 355 F.2d 788, 792 (C.A. 4); *N.L.R.B. v. Universal Packaging Corp.*, 361 F.2d 384, 387 (C.A. 1). I therefore conclude that Respondent was motivated to discharge her, at least, in part because of her participation in protected concerted activity in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. By first suspending Murray, and thereafter discharging him and Fosgate and refusing to reinstate them because they engaged in protected concerted activities, Respondent interfered with, restrained, and coerced them in the exercise of their rights guaranteed by Section 7 of the Act, and thereby engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully suspended Murray and thereafter discharged him and Fosgate, I shall recommend that Respondent be ordered to offer them reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other

rights and privileges, dismissing, if necessary, any one who may have been hired to replace either of them, and to make them whole for any loss of earnings they may have suffered by reasons of their unlawful suspension and/or discharge. Since it is a fair inference from the record that both Murray and Fosgate would have returned to work on October 18, when all the other laboratory workers resumed working, Respondent will be required to make them whole for their loss of earnings by payment to each of them of the sum which they would normally have earned on and after October 18 to the date Respondent offers them reinstatement, less their net earnings during that period. The backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 N.L.R.B. 289, and shall include an allowance for interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing and Heating Co.*, 138 N.L.R.B. 716.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, and pursuant to Section 10(*c*) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, Difco Laboratories, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or refusing to reinstate any employee because he has assisted a labor organization by refusing to cross a lawful picket line at his place of work.

(b) In any like or related manner interfering with,

restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer to David C. Murray and Vivian Fosgate immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by reason of their unlawful suspension and/or discharge and refusal to reinstate them, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll and other records helpful to analyze and determine the amount of backpay due under the terms of this Order.

(c) Notify David C. Murray and Vivian Fosgate, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Post at its plant in Detroit, Michigan, copies of the attached notice marked "Appendix."[15] Copies of said

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[15] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

notice, on forms to be provided by the Regional Director for Region 7, shall, after being signed by an authorized representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted, shall take reasonable steps by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.[16]

Dated at Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL NOT suspend, discharge, or refuse to reinstate any employee for refusing to cross a picket line to come to work during a lawful strike at our plant.

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[16] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 7, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of his right, guaranteed in the National Labor Relations Act, to assist a labor organization.

WE WILL offer to David C. Murray and Vivian Fosgate immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges enjoyed by them, and make them whole for any loss of pay which they may have suffered by reason of their suspension and/or discharge.

DIFCO LABORATORIES, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

Note: We will notify David C. Murray and Vivian Fosgate, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 226-3244.

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In the Supreme Court of the United States

October Term, 1978

DIFCO LABORATORIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
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MARCEL MALLET-PREVOST,
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Deputy Associate General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 9-12) is not yet reported. The Board's decision and order (Pet. App. B 13-14, 15-32) are reported at 172 NLRB No. 235.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1970. The petition for a writ of cer-